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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL SHOPMEN PENSION FUND,

*Petitioner,*

v.

REUBEN MCDANIEL, JOE P. MARTIN, EILEEN HERRALA, JOSEPH GUENTHER, AND HENRY MOSER,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## MOTION OF THE NATIONAL ROOFING INDUSTRY PENSION FUND FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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The National Roofing Industry Pension Fund ("Pension Fund") hereby respectfully moves for leave to file a brief as *amicus curiae* in this case in support of petitioner, as provided in Rule 37 of the Rules of this Court. The consent of the attorney for the petitioner has been obtained. The consent of the attorneys for respondents was requested but refused.

The Pension Fund is a national multiemployer pension fund under the Employee Retirement Income Security Act ("ERISA") of 1974, as amended §§ 2 et seq., 29 U.S.C. §§ 1001 et seq. (1985), which is maintained pursuant to numerous collective bargaining agreements and which provides benefits

to participants in multiple states throughout the United States. The Pension Fund is in no way affiliated with petitioner National Shopmen Pension Fund. However, the basic issue proposed by this case is of great concern to all employee benefit plans under ERISA and, in particular, multiemployer plans. Specifically, the Pension Fund represents approximately 21,000 employees who would be directly affected by the Court's decision regarding this issue. The basic issue presented in this case is what is the standard for reviewing the application of a pension plan provision which does not violate any express statutory mandate and which results in a loss or reduction of benefits. Because ERISA mandates that fiduciaries apply plan rules and regulations in a consistent and nondiscriminatory manner, this issue has implications extending far beyond the particular situation now before the Court and, in particular, for national plans such as the Pension Fund. Fiduciaries of national pension plans daily make decisions that may now be second-guessed under a far more strict standard of review if the decision of the Ninth Circuit is allowed to stand. Accordingly, as a national multiemployer pension plan under ERISA, the Pension Fund desires the opportunity to present its views on the matter to this Court.

Petitioners will necessarily concentrate on particular facts of their own case. In the brief tendered with this Motion, the Pension Fund addresses how the Ninth Circuit's decision will affect the administration of national pension plans. Specifically, we emphasize legislative history and general implications of the decision which we believe the Court should take into account. We believe that our contributions should assist the Court in considering the issue in a broader context as to its effect on employee benefit plans throughout the country.

WHEREFORE, the Pension Fund respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of petitioner National Shopmen Pension Fund.

Respectfully submitted,

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# BRIEF *AMICUS CURIAE* OF THE NATIONAL ROOFING INDUSTRY PENSION FUND IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*

The interest of the National Roofing Industry Pension Fund ("Pension Fund") is set forth in the accompanying Motion for Leave to File Brief as *Amicus Curiae* in support of the petitioner National Shopmen Pension Fund.

## SUMMARY OF ARGUMENTS

The Ninth Circuit's decision below, reported as *McDaniel* v. *National Shopmen Pension Fund*, 889 F.2d 804 (9th Cir.

1989), regarding the standard for reviewing the application of pension plan provisions which do not violate an express ERISA mandate and which result in a loss or reduction of benefits conflicts with a decision from the Court of Appeals for the District of Columbia Circuit; such a conflict impedes the ability of a plan administrator or fiduciary to apply and interpret such plan provisions in a consistent and nondiscriminatory manner as mandated by ERISA. This conflict must be resolved in order for plan administrators and fiduciaries to apply plan provisions consistently and to predict the legality of proposed actions.

The Ninth Circuit's decision below regarding the standard of review is erroneous. The Ninth Circuit's decision holds that the application of a pension plan provision which is not mandated by ERISA and which results in a loss or reduction of benefits is arbitrary and capricious unless the overall financial stability of the plan is endangered. Because this standard ignores the reasonableness of such a plan provision and whether its application promotes a reasonable purpose, the Ninth Circuit's decision should be reversed and a standard of review which considers the reasonableness of such a provision and whether its application promotes a reasonable purpose should be adopted.

## ARGUMENTS

### I. The Conflicting Circuit Court Decisions Interfere with the Ability of a Fiduciary to Apply Plan Provisions Uniformly and to Predict the Legality of Proposed Actions.

The Court of Appeals for the District of Columbia Circuit in *Stewart* v. *National Shopmen Pension Fund*, 795 F.2d 1079 (D.C. Cir. 1986), held that a pension fund under ERISA seeking to apply a plan provision which does not violate an ERISA mandate and which results in a loss or a reduction of

benefits must prove that such a provision has a reasonable purpose and that the application of the provision will promote that purpose. *Id.* at 1083. If the pension fund cannot prove that the purpose of the provision is reasonable and that its application promotes this purpose, the application of such a provision is arbitrary and capricious. *Id.* However, in its decision below, the Court of Appeals for the Ninth Circuit held that a multiemployer pension fund seeking to apply a pension plan provision which does not violate an express ERISA mandate and which results in a loss or reduction of benefits must demonstrate that the overall financial stability of the plan is endangered. If the pension fund fails to prove that the financial stability of the plan is endangered, the application of such a provision is arbitrary and capricious. The Ninth Circuit's decision in effect disregards the reasonableness of such a plan provision and creates a far more strict standard of review, which is essentially a *per se* rule. The Ninth Circuit expressly noted that its decision "is in apparent conflict with the D.C. Circuit." *McDaniel*, 889 F.2d at 805 n.2.

The Pension Fund is a national pension fund and, as such, it has plan participants who reside in different circuits. ERISA requires plan administrators and fiduciaries to apply plan rules and regulations in a consistent and nondiscriminatory manner. *See* ERISA § 404, 29 U.S.C. § 1104 (1985) (a fiduciary shall discharge his duties solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries). However, the conflicting circuit court decisions regarding the standard of review interfere with the uniform application of plan provisions. As the Court in *Stewart* noted, a fiduciary's duty "extends to *all* . . . participants." *Stewart*, 795 F.2d at 1084 (emphasis original). An administrator's failure to reduce benefits to some participants as required by a plan provision, which is intended to protect the plan's assets, may

result in a grant of a preference to some participants that is not available to other participants. *Id.*

Furthermore, in enacting ERISA, Congress intended to provide uniform laws governing pension plans and to allow plan administrators and fiduciaries to predict the legality of proposed actions. *See* H. R. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4650; S.Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4865. However, this conflict among the circuits regarding the standard of review creates an uncertainty as to the legality of proposed administrative actions because administrative actions are considered under a far more strict standard of review in the Ninth Circuit than in the District of Columbia Circuit. This uncertainty as to the legality of proposed actions may detrimentally affect plan participants because some participants may receive a preference not accorded to other participants. This uncertainty may also result in a reluctance by pension plan fiduciaries to enforce plan provisions and, thereby, subject such plan fiduciaries to personal liability and civil penalties under ERISA for a breach of fiduciary duty for failure to follow plan documents. ERISA §§ 404(a)(1)(D) and 409, 29 U.S.C. §§ 1104(a)(1)(D) and 1109 (1985); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-166, 103 Stat. 1159 (to be codified at ERISA § 502(1), 29 U.S.C. § 1132(1)). Therefore, this Court's consideration of the standard of review in this matter is necessary for plan administrators and fiduciaries to consistently apply plan provisions and predict the legality of proposed actions.

## II. The Ninth Circuit's Decision Regarding the Standard for Reviewing the Application of a Pension Plan Provision Which does not Violate an Express Statutory Mandate and Which Results in a Loss or Reduction of Benefits is Erroneous Because it does not Consider the Reasonableness of Such a Provision.

In light of the conflict and the *per se* standard created by the Ninth Circuit's decision below, it is appropriate for this Court to review this matter. ERISA and its legislative history do not provide clear guidelines as to the standard for reviewing the application of pension plan provisions which are not mandated by ERISA and which result in a loss or reduction of benefits. This Court has held that given the language and history of ERISA courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56, 107 S.Ct. 1549, 1558, 95 L.Ed. 2d 39, 53 (1987). Therefore, because this Court has not expressly considered the standard for reviewing the application of such plan provisions, the issue presented in this matter gives the Court an opportunity to provide clear guidelines as to the applicable standard of review.

An appropriate standard for reviewing the application of such pension plan provisions would be analogous to the standard applied by this Court in *Firestone Tire and Rubber Co.* v. *Bruch*, __ U.S. __, 109 S. Ct. 948, 103 L.Ed. 80 (1989). In *Firestone*, this Court held that if a benefit plan provides the administrator or fiduciary with discretionary authority to determine eligibility for benefits or construe the terms of the plan the administrator's or fiduciary's determination shall be reviewed under the abuse of discretion standard. *Firestone*, 109 S. Ct. at 956. Although the decision in *Firestone* does not address the standard of review presented in this matter, this Court's statements regarding the standard of review in

*Firestone* provide some guidance. In *Firestone*, this Court stated that ERISA's statutory language and legislative history confirm that the principals of trust law are to be incorporated into ERISA's fiduciary responsibility provisions. *Id.* at 954. This Court noted that when a trustee is given power to construe ambiguous terms, in such circumstances, the trustee's interpretation will not be disturbed if it is reasonable. *Id.* (citing G. Bogart and G. Bogart, *Law of Trust and Trustees* § 560 pp. 169-171 (rev. 2d ed. 1980)). The underlying reasonableness of a provision and whether its application promotes a reasonable purpose should be likewise considered in reviewing the application of a pension plan provision which is not mandated by ERISA and which results in a loss or reduction of benefits.

A consideration of the reasonableness of such a plan provision is important because plan fiduciaries are generally more aware of the purposes of plan rules and regulations and are more familiar with the needs of their industry than are courts. This is particularly true of multiemployer plans which are collectively bargained. Allowing courts to review pension plan provisions without considering the reasonableness of such provisions in effect allows courts to rewrite a plan.

Therefore, in adopting a standard for reviewing the application plan provisions which are not mandated by ERISA and which result in a loss or a reduction of benefits payable, a standard of review which considers the reasonableness of the provision and whether its application promotes a reasonable purpose should be adopted rather than a *per se* rule which holds that such a provision is arbitrary and capricious unless the financial stability of the plan is endangered. Thus, this Court is urged to review this matter and reverse the Ninth Circuit's decision and adopt the District of Columbia Cir-

cuit's expression of the standard of review for such plan provisions.

Alternatively, the standard for reviewing an interpretation of a plan provision, as expressed in *Firestone*, should be adopted as the standard for reviewing an application of a plan provision which does not violate an ERISA mandate and which results in a loss or reduction of benefits. Reviewing an application of such a plan provision is essentially the same as reviewing an interpretation of a plan provision. Therefore, we urge this Court to reverse and remand the Ninth Circuit's decision for consideration consistent with this Court's Opinion in *Firestone*.

## CONCLUSION

For the reasons discussed above, *amicus curiae* National Roofing Industry Pension Fund urges this Court to grant the petitioners request for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and to reverse the Ninth Circuit's decision below.

Respectfully submitted,

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